

*United States v. Costa*, No. 07-10092

JAN 17 2008

THOMAS, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

Because I disagree with the majority's conclusion that probable cause existed for the issuance of the second and third search warrants, I must respectfully dissent.

I agree with the district court's conclusion that the second and third searches were not supported by probable cause. Probable cause exists where "under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Luong*, 470 F.3d 898, 902 (9th Cir. 2006) (internal quotations and citations omitted). We have previously held that an uncorroborated anonymous tip and allegations of high energy usage are insufficient to establish probable cause. *See United States v. Clark*, 31 F.3d 831, 834-35 (9th Cir. 1994). Although a "thermal imaging search is less intrusive than a physical search, the degree of probable cause required is not diminished merely by virtue of that fact." *United States v. Huggins*, 299 F.3d 1039, 1044 (9th Cir. 2002).

The second search warrant – the warrant for thermal imaging – was supported by an anonymous tip indicating that Costa had a connection with a possible indoor marijuana grow at the Mercedes Avenue address, information that Costa had previously been convicted for cultivation and possession of marijuana,

allegations of high energy usage at the Mercedes Avenue address, and an officer's observation of the property that revealed an outbuilding, a cargo container, two exhaust fans, and efforts to obstruct the view of the property from the street.

The evidence in support of the second warrant is indistinguishable from that in *Clark*. Police were unable to locate a driver's license history or other information linking Costa to the Mercedes Avenue address. Costa's criminal history was therefore irrelevant to establishing that contraband or evidence of a crime would be found in that particular place. Both the officer's physical description of the property and the allegations of high energy usage were consistent with legitimate uses. The anonymous tip remained uncorroborated. The "totality of the circumstances" was insufficient to support a finding of probable cause.

The third search warrant was supported by essentially the same information, with the addition of the thermal imaging scan results. Even if the thermal imaging information had not been the product of a faulty warrant, it would have been insufficient to tip the scales in the direction of a finding of probable cause. The extent of the additional information was that "[t]he thermal imaging unit indicated a high heat source emitting from the primary residence. The thermal imaging unit is unable to detect a heat source through a fence or other solid structure and

therefore could not provide an accurate reading of the wooden structure.” Unlike the detailed thermal imaging results and explanations given in *Huggins*, the results here simply indicated that the primary residence was emitting heat. *See* 299 F.3d at 1042. The emission of heat is consistent with legitimate uses of the property. Again, the totality of the circumstances was insufficient to support a finding of probable cause.

I respectfully disagree with the district court that the fruits of the improper searches could be saved from suppression by the “good faith” exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897 (1984). To determine whether this exception applies, we ask “whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate’s authorization.” *Luong*, 470 F.3d at 902 (internal quotations omitted). Reliance on a warrant is not objectively reasonable where the affiant knowingly or recklessly misleads the judge with false information. *Id.*

Here, the affidavit in support of the second warrant included recklessly-made misleading statements and omissions. While the affidavit noted that police were unable to find a driver’s license history linking Costa to the Mercedes Avenue address, it failed to mention that police had connected Costa with another address, information that would have undermined the anonymous tip. In addition,

the affidavit referred to the anonymous tipster as a “CI”: an abbreviation usually used for a “confidential informant,” a category of informant generally understood to be more far more reliable than an anonymous tipster. Finally, the affidavit stated that the affiant “checked several PG&E bills of homes of comparable size and learned that the average monthly kilowatt usage was 450.” This statement implied that the officer had conducted a methodical, objective examination of utility data about comparable residences and used statistical methods to compute averages. In fact, the officer had just called a few friends and asked them if they could recall what their recent heating bills were.

The affidavit in support of the third warrant corrected some of the misstatements made in the second, but replaced them with new misstatements. For both warrants, because the affiant recklessly misled the judge with false information, the good faith exception to the exclusionary rule does not apply. Thus, I would vacate Costa’s conviction and remand to the district court with an order directing that Costa’s motion to suppress be granted.